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No. 91-1790

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

WELDON PARKHILL, HENRY B. PARKHILL, DAVID C. COWDEN, JOHN B. RUNGE, INDIVIDUALLY and d/b/a PARKHILL, COWDEN & RUNGE, A General Partnership, JOHN VAUGHAN, PARKHILL, PARKHILL, COWDEN & RUNGE, A Professional Corporation and PARKHILL & PARKHILL, A General Partnership,

Petitioners,

vs.

EDWIN I. ADUDDELL,

Respondent.

Petition For Writ Of Certiorari To The Texas Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW RESTATED

Does the retroactive application of a state supreme court decision violate the due process clause of the Fourteenth Amendment, when the decision vitiates a previously vested statute of limitations defense, and revives a defendant's liability for punitive damages?

Is the due process clause of the Fourteenth Amendment violated when a defendant is retroactively subjected to liability for punitive damages?

REPLY: This Court lacks jurisdiction to review and issue an advisory opinion in this case since there is no final judgment awarding any damages; the questions involve purely a matter of state procedural law; Petitioners have failed to properly present these points in the state courts and have waived them; and this case does not involve the retroactive application of a statute of limitation defense destroying vested rights, but rather the application of a century old principle of tolling of statute of limitations.

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OPINIONS BELOW

Respondent disagrees that *Hughes v. Mahaney,* 35 S. Ct. J. 157 (Tex. 1991) (*see Appendix B* to Petition for Writ of Certiorari) adopted a new rule of law, but rather applied a century old principle of tolling of limitations in legal malpractice actions.

JURISDICTION

With respect, this Court lacks jurisdiction under 28 U.S.C.A. § 1257(3). Although the form of the Petition claims infringement of constitutional rights, the substance of this case involves a nonfinal judgment wherein the Texas Supreme Court applied a principle of tolling, rooted in the jurisprudence of Texas for over a century, to a statute of limitations defense in legal malpractice actions. This is purely a matter of state procedural law and does not present a federal question. Petitioners waived any constitutional claims since they were not timely presented to the state courts of Texas, there is no final judgment awarding any damages as the case merely reversed and remanded the granting of a summary judgment, and this Court cannot render an advisory opinion.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent understands Petitioners are invoking the due process clause of the 14th Amendment to the United States Constitution, but Respondent strenuously disagrees that any constitutional questions are applicable in the instant case. (*See* jurisdictional arguments above.)

STATEMENT OF THE CASE

There are many factual inaccuracies in Petitioners' summary of the statement of the case. For example, in addition to filing a lawsuit against his attorneys for negligently failing to timely file the asbestosis claim which

resulted in it being barred by the statute of limitations, Respondent alleged many other causes of action based on their errors in mishandling his case based upon negligence, gross negligence, breach of warranty and the Texas Deceptive Trade Practices Act, § 17.41 *et seq.* for Tex. Bus. & Com. Code. The trial court did not rule that Respondent had waived the discovery rule, but merely granted a summary judgment based upon one or more of the grounds raised in the Petitioners' motion. To the contrary, Respondent had asserted the discovery rule in a lengthy response which was filed. Respondent also takes issue with the notion that the Supreme Court adopted a "new rule tolling limitations" when it decided *Hughes v. Mahaney, supra*, which relied upon case law embedded in Texas law for over a century under which the statute of limitations is tolled pending legal proceedings. The Texas Supreme Court merely extended a well settled tolling principle to legal malpractice actions so that where a legal malpractice lawsuit arises out of the handling or mishandling of litigation, limitations will be tolled during the pendency of that lawsuit. Respondent would also point out that Petitioners first raised constitutional grounds in a motion for rehearing filed in the Texas Supreme Court, and have failed to properly present these issues to the Texas courts and have therefore waived them.

REASONS FOR DENYING THE WRIT

THIS COURT LACKS JURISDICTION TO REVIEW A NON-FINAL JUDGMENT WHERE THE CONSTITUTIONAL QUESTION HAS NOT BEEN ADDRESSED BY THE COURT OF LAST RESORT.

This Honorable Court cannot render advisory opinions, *Zacchini v. Scripps Howard Broadcasting Co.*, 433 U.S. 562, 97 S. Ct. 247 (1977), nor review the constitutionality of a state law that has not been addressed by the state court of last resort. *Anonymous Numbers 6 and 7 v. Baker*, 360 U.S. 287, 3 L.Ed.2d 1234, 79 S. Ct. 1157 (1959); *Accord, Kimball v. Florida Bar*, 465 F. Supp. 925 (D.C. Fla. 1979) aff'd 632 F.2d 1283. The Texas Supreme Court merely remanded for new trial, there has been no award and this is not a reviewable final judgment. *Bruce v. Tobin*, S.D. 245 U.S. 18, 38 S. Ct. 7 (1917); *O'Dell v. Espinoza*, 456 U.S. 430, 102 S. Ct. 1865, 72 L.Ed.2d 237 (1982).

PETITIONERS FAILED TO PRESENT THE FEDERAL QUESTIONS IN CONFORMANCE WITH STATE PROCEDURES AND HAVE WAIVED THE POINTS.

Petitioners first raised the constitutional points in the Texas Supreme Court in a motion for rehearing. Although the Texas Supreme Court denied the petition for rehearing, the Texas courts have not had an opportunity to address this nonmeritorious point. A failure to present a federal question in conformance with state procedures justifies a denial of the writ. *Michigan v. Tyler*, 436 U.S. 499, 98 S. Ct. 1942, 56 L.Ed.2d 486 (1978). This Court properly denies a writ where the state court has had no opportunity to pass upon the questions. *Monk v. N.J.*, 90 S. Ct. 1563, 398 U.S. 71, 26 L.Ed.2d 54 (1970); *Pickering v.*

Board of Education of Township H.S. District No. 205 Will County, Illinois, 391 U.S. 563, 88 S. Ct. 1731, 20 L.Ed.2d 811 (1968). (A constitutional claim of due process raised for the first time in the Supreme Court is too late.) *Fuller v. Oregon,* 417 U.S. 40, 94 S. Ct. 2116, 40 L.Ed.2d 642 (1974).

This Court has rejected a due process challenge to a punitive damage claim which was not, as in the instant case, raised either in the trial court or in the Court of Appeals. *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 106 L.Ed.2d 219, 109 S. Ct. 2909 (1989); *accord, Bankers Life & Casualty Co. v. Crenshaw,* 486 U.S. 71, 108 S. Ct. 1645, 100 L.Ed.2d 62 (1988).

THIS COURT WILL NOT REVIEW A STATE COURT DECISION RESTING ON ADEQUATE AND INDEPENDENT STATE PROCEDURAL GROUNDS THAT DOES NOT INFRINGE UPON CONSTITUTIONAL RIGHTS.

This Court will not review a state court decision resting on adequate and independent state grounds, *Murdock v. Memphis,* 87 U.S. 590 (1875); *Caldwell v. Mississippi,* 472 U.S. 320 (1985); and has no jurisdiction to review a state court's interpretation of state law so long as it does not intrude upon federal law. *Rescue Army v. Municipal Court,* 331 U.S. 549 (1947). Nor will this Court review state procedural questions that do not infringe upon constitutional rights. *Henry v. Mississippi,* 379 U.S. 443 (1965). The instant case does not involve any constitutional questions, but merely an interpretation of state procedural law. The rule of law announced by the Texas Supreme Court, involves the application of well settled tolling principles to the limitations defenses in malpractice actions. In *Hughes v. Mahaney* and in *Aduddell v. Parkhill,*

the Texas Supreme Court cited century old case law, *Fields v. Austin*, 30 S.W. 386 (Tex. App. 1885, writ ref'd) and *Walker v. Haras*, 570 S.W.2d 534 (Tex. App. – Corpus Christi 1978, writ ref'd n.r.e.).

Statutes of limitations have reference to the remedy and do not confer a vested right. *Travis County v. Matthews*, 235 S.W.2d 691 (Tex. App. 1950, writ ref'd n.r.e.); *Amarillo Independent School District v. Brockmeyer*, 292 S.W.2d 886 (Tex. App. – Amarillo 1956); *Dallas v. Etheridge*, 253 S.W.2d 640 (Tex. 1952); *Sowders v. M. W. Kellogg Co.*, 663 S.W.2d 644 (Tex. App. – Houston 1983, writ ref'd n.r.e.). That a statute of limitation defense may not be available does not raise constitutional questions. For example, a statute of limitation defense may be waived if not raised. *See* 50 *Tex. Jur. III*, "Limitation of Actions," § 164, pp. 633-635. Legislation that suspends limitations have been upheld against various constitutional attacks, including ex post facto effect. *See Bender v. Crawford*, 33 Tex. 745 (1870). Limitations were successfully suspended during time of war, *Maloney v. Roberts*, 32 Tex. 136 (Tex. 1869), and a federal statute tolling limitations during periods of military service have been upheld. *Crawford v. Adams*, 213 S.W.2d 721 (Tex. App. 1948, writ ref'd n.r.e.) There are legislative tolling provisions which have been upheld including a statute tolling limitations against a person while outside the state, *Deitz v. Vaughn*, 423 S.W.2d 113 (Tex. App. – Waco 1967) aff'd 430 S.W.2d 47; and statutes tolling limitations during a period of disability of incapacity, for persons while serving in the armed forces or during a period of minority. *See* 50 *Tex. Jur. III*, "Limitations of Actions," §§ 119-123. The courts have also recognized nonstatutory tolling provisions such

as fraudulent concealment, *Borderlon v. Peck*, 661 S.W.2d 907 (Tex. 1983) and the concept of a continuing tort. *Twyman v. Twyman*, 790 S.W.2d 819 (Tex. App. – Austin 1990) writ granted 34 Tex. Sup. Ct. J. 173.

There are some Texas cases that hold the legislature may not enact laws to apply retroactively to impair vested rights. In *Mellanger v. Mayor of Houston*, 3 S.W. 249 (Tex. 1887), the court held the legislature could not enact new legislation to allow the collection of taxes after the limitation period had run. *Wilson v. Work*, 62 S.W.2d 490 (Tex. 1933), held that new legislation could not be applied retroactively to destroy a vested right. These cases are inapplicable for the instant case does not involve the application of legislation retroactively to revive a claim barred by existing law. This case involves the application of a well settled judicial tolling rule of law. Petitioners have no vested right in the non-application of a tolling principle to a statute of limitation defense that had been embedded in Texas law for nearly a century. Limitations pertain to the remedy that may be affected and not to substantive rights, and a change in a statute of limitation applicable to a cause of action that is not barred is not within the constitutional prohibition against retroactive statutes. 12 *Tex. Jur. III*, "Constitutional Law," § 181 nn 95-96, § 185. Petitioners cite *McClung v. Johnson*, 620 S.W.2d 644 (Tex. App. – Dallas, writ ref'd n.r.e.), however, that case involved the retroactive application of legislation which purported to revive a cause of action otherwise barred by the statute of limitations. There has been no legislative impairment of a vested right in the instant case.

PUNITIVE DAMAGES QUESTIONS WERE NOT PROPERLY PRESENTED TO THE STATE COURTS AND WERE WAIVED OR ARE PREMATURE AS THERE HAS BEEN NO AWARD.

This Honorable Court has rejected constitutional challenges to punitive damage awards which were not raised, as here, in the trial court or the Court of Appeals, *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 106 L.Ed.2d 219, 109 S. Ct. 2909 (1989). Nor will this Court review constitutional challenges to punitive damage claims which were not properly presented or passed upon by the state's highest court. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 100 L.Ed.2d 62, 108 S. Ct. 1645 (1988). In the instant case, none of the Texas courts passed upon the constitutional challenge to the punitive damage question since it was not presented in the trial court, Court of Appeals or to the Supreme Court until raised in a motion for rehearing. Further, there has been no trial of the case, merely a reverse and remand for a new trial. There may or may not be an award of punitive damages in this case, and for this Court to grant the Petition for Writ of Certiorari and review the punitive damage question where there has been no award would be to render an advisory opinion. *Zacchini v. Scripps Howard Broadcasting Co.*, 433 U.S. 562, 97 S. Ct. 2847 (1977).

This is not the retroactive application of law which revives a punitive damage claim, but rather the application of well settled tolling principle to a statute of limitation defense. Since the statute of limitation affects the remedy and not substantive rights, there is no substantial federal question raised. 12 *Tex. Jur. III*, "Constitutional

Law," § 181 nn 95-96, § 185. Although this Court did review the constitutionality of punitive damages under the due process clause in *Pacific Mutual Life Insurance Co. v. Haslip*, ___ U.S. ___, 111 S. Ct. 1032 (1991), there was a trial and an award of actual and exemplary damages and constitutional challenges to the award of punitive damages were asserted in the state courts in accordance with state court procedure. These questions are premature. There is no slate for this Court to write upon and Petitioners have no vested rights in having the Texas Supreme Court ignore 100 years of case law.

CONCLUSION

The Petition for Writ of Certiorari should be denied. There are no constitutional questions presented and the state court decision rests on adequate and independent state procedural grounds. There is no final judgment nor award of actual damages or exemplary damages and this Court cannot render an advisory opinion as to constitutional claims which have not properly been presented to the state court.

Respectfully submitted,

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